IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 508 of 1997

For Approval and Signature:

HON'BLE MR.JUSTICE B.J.SHETHNA sd/-
and
HON'BLE MR.JUSTICE J.R.VORA sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

HASMUKH KALIDAS

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 508 of 1997

MR PM VYAS for Petitioner No. 1

MR PRACHCHHAK, A.P.P. for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 05/02/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE B.J.SHETHNA)

1. The appellant-accused Hasmukh Kalidas Vasava has

filed this Appeal, through Jail, and challenged the impugned Judgment and order of conviction and sentence dated 21.4.1997 passed by the learned Sessions Judge, Bharuch, in Sessions Case No.230 of 1996, whereby the learned Judge convicted the appellant - accused for the offences u/ss. 302 & 504 I.P.Code and also u/ss. 37(1) and 135 of the Bombay Police Act. For the offence u/s.302 I.P.Code he has awarded Life imprisonment and to pay fine of Rs.5000/- i/d. to further under-go one year R.I. However, for the rest of the offences he was acquitted. While passing the order of fine of Rs.5000/- the learned Judge ordered that if the fine of Rs.5000/- is paid by the accused then the same may be given to the witness Anuben daughter of Nagibhai after proper verification and identification.

2. On 2.5.1996 at about 9.30 pm. in the night, the incident in question took place at village Navi Nagri, wherein it is alleged that the appellant - accused committed murder of deceased Rakeshbhai Pirubhai Vasava, aged 22, by giving knife blows. On that day there was marriage of Mukeshbhai Devasbhai Vasava in the street where deceased Rakesh was staying. Deceased Rakesh had gone to the marriage Mandap. At that time Ramesh Dahyabhai, brother of Rakesh, Jayantibhai Shanabhai and Hasmukh Kalidas were dancing along with deceased Rakesh. While dancing deceased Rakesh dashed with accused Hasmukh, who was playing big drum (Padgham), therefore, accused felt offended and started abusing them. Thereupon, he was told not to give abuses. He got excited and took out knife from his pocket and gave blows on the neck, left chest and on the shoulder of deceased Rakesh, because of that he fell down and accused Hasmukh ran away from the place. Deceased Rakesh Pirubhai Vasava was removed to the Ankleshwar Government Hospital by his wife, Chhotubhai Somabhai and Subhash Ramanbhai Vasava in Auto-rickshaw. Police came there at the Hospital and recorded F.I.R. of Rakesh Pirubhai Vasava and registered the offences against the accused u/ss.307, 504 I.P.Code and u/s.135 of the Bombay Police Act on the same night i.e. on 2.5.1996. After giving primary treatment the Doctor from Ankleshwar Hospital advised them to go to Bharuch and from Bharuch Rakesh was removed to Vadodara S.S.G.Hospital where his Dying Declaration was recorded by Executive Magistrate Shri Chandrakant Patel, P.W.3, Ex.23, on 3.5.1996 at 11.10 a.m. which was over at 11.30 a.m. on that day. Deceased Rakesh stated in his statement before the Executive Magistrate that while dancing in the marriage of his cousin Mukesh he dashed with accused Hasmukh of Haripura village who was playing drum. Thereupon, accused got excited and took out knife

and gave first blow on the neck, then on left side of the body and then on the back and thereby attempted to kill him. He was brought to the hospital by his relatives. He has also clearly stated that prior to the incident he has no enmity with the accused nor even strain relations with the accused. On 4th he succumbed to the injuries. Therefore, Section 302 I.P.Code was added. After completing the investigation Police filed charge-sheet against the accused for the offence u/s.302 I.P.Code, etc. before the court of learned Magistrate, who in turn committed the case to the Court of Sessions.

Before the learned Sessions Judge the prosecution examined as many as 14 witnesses, including three eye witnesses, namely, (i) Subhashbhai Ramanbhai Vasava, P.W.2, Ex.21, (ii) Kalidas Dahyabhai Vasava, P.W.5, Ex.30 and (iii) Chhotubhai Somabhai, P.W.8, Ex.38. The prosecution has also examined Shri Chandrakant Patel, Executive Magistrate, P.W.3, Ex.23, who recorded Dying Declaration (Ex.25) of the deceased at S.S.G.Hospital, Vadodara, P.S.I. Shri Karamsinh Prabhatsinh Desai, P.W.6, Ex.31, who has also recorded dying declaration of deceased Rakesh, which is at Ex.32, is also examined by the prosecution. Somiben, mother of deceased and Anuben, wife of deceased, were examined as P.W.10 and P.W.11 respectively. The prosecution also examined Doctors as well as Police witnesses and the Panch witnesses to prove its case against the accused. The prosecution has also tried to rely upon the Dying Declaration Exh.25 & 32 made by deceased Rakesh and also the Panchnama of scene of offence Ex.35 and the map of scene of offence Ex.29. Considering the oral as well as documentary evidence led by the prosecution and the evidence of defence witness Devasbhai Morarbhai (D.W.1), the learned Judge came to the conclusion that the defence of the accused cannot be believed and the prosecution has proved its case against the accused beyond reasonable doubt. Accordingly, the learned Judge convicted the appellant - accused for the offence u/s.302 I.P.Code for committing murder of deceased Rakesh. This Judgment and order of conviction and sentence is challenged in this Appeal.

3. We have heard learned Counsel for the parties at great length. We have been taken through the evidence of three eye witnesses, namely, (i) Subhashbhai Ramanbhai Vasava, P.W.2, Ex.21, (ii) Kalidas Dahyabhai Vasava, P.W.5, Ex.30. and (iii) Chhotubhai Somabhai, P.W.8, Ex.38. All of them have claimed to have witnessed the incident, but on close scrutiny of their evidence it is clear that none of them had actually seen the incident as per the evidence before the Court. From their evidence

it is clear that they were not telling the whole truth in the matter. With a view to involve the accused for the offence u/s.302 I.P.Code they came out with the story that initially there were exchange of words between the accused and deceased because the deceased dashed with the accused who was playing drum at that time, later on they were specified by them and matter was over. However, within a short time accused and others dragged the deceased inside the house of Mukesh and gave three blows with knife and because of that deceased came out running from the house of Mukesh and fell on the Ota of Kalidas, which was opposite to the house of Mukesh. Thus, they wanted to make out a case against the accused for the offence u/s. 302 I.P.Code, whereas two dying declaration, Ex.25 and 32 made by deceased Rakesh clearly shows that the incident in question took place all of a sudden because the deceased dashed, while dancing, with accused Hasmukh who was playing drum at that time and because of heat exchange of words the accused lost his tamper and gave three knife blows to the deceased. We have no reason not to believe those two dying declarations made by deceased Rakesh. It is sufficient to hold the appellant accused guilty for causing death of deceased Rakesh, but the question is whether the appellant - accused can be convicted for major offence u/s.302 I.P.Code or not ?

4. We have already reproduced those two dying declarations Ex.25 & 32 made by deceased Rakesh in a nutshell. From the same it is clear that the case of the appellant - accused falls under Exception : IV to Section 300 I.P.Code. Therefore, in our considered opinion he cannot be convicted for the major offence u/s.302 I.P.Code. The next question is that he can be convicted u/s.304, Part:I or II I.P.Code.

It was contended by the learned Counsel for the appellant - accused that there was no intention of the accused. Therefore, he can at the most be convicted for the offence u/s.304, Part:II I.P.Code. However, we are not prepared to accept this submission made by the learned Counsel for the Appellant - accused, because the appellant - accused gave as many as three knife blows to the deceased, one of them was on the vital part of the body. In that view of the matter it cannot be said that the accused had simple knowledge and no intention. Hence, his case falls u/s.304, Part:I and not u/s.304, Part:II I.P.Code.

5. In view of the above discussion, this Appeal is partly allowed and the impugned Judgment and order of

conviction and sentence passed by the learned Sessions Judge, Bharuch, on 21.4.1997, convicting the appellant accused for the offence u/s.302 I.P.Code is altered and the appellant - accused is convicted for the offence u/s.304, Part:I I.P.Code. The Jail record of the Appellant - accused, produced by learned A.P.P. Shri Prachchhak shows that as an under-trial prisoner the appellant - accused remained in jail for a period of almost one year and after conviction he remained in jail for a period of more than 6 years and 5 months. He has earned remission of 2 years. Thus, he has under-gone sentence of more than 9 years. At the time of commission of offence he was only 22 years old. Under the circumstances, we are of the considered opinion that the aforesaid period of sentence, as under-gone, is passed then it would serve the ends of justice.

6. In view of the above discussion, this Appeal is partly allowed. The impugned Judgment and order of conviction and sentence dated 21.4.1997 passed by the learned Sessions Judge in Sessions Case No.230 of 1996 holding the appellant - accused guilty for the offence u/s.302 I.P.Code and sentenced him to suffer life imprisonment and to pay fine of Rs.5000/- i/d to further under-go one year R.I. is hereby quashed and set aside and the appellant - accused is held guilty and convicted for the lesser offence u/s.304 Part-I I.P.Code. The Appellant-accused had already undergone sentence for a period of more than 9 years, therefore, the said period be treated sentence as already undergone. If the appellant-accused is not required in any other case then he may be released from the jail forthwith.

(B.J.Shethna, J.)

Date : February 05, 2004

(J. R. Vora, J.)

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